# HA Securities Sdn Bhd v Ng Kong Yeam

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-955-90
ABDUL MALEK J
4 AUGUST 1993

***Contract*** *— Terms of contract — Constuction of memorandum of understanding — Obligations of parties on happening of specific event — Balance of probabilities*

***Contract*** *— Terms of contract — Construction of memorandum of understanding — Whether straightforward sale with obligation to purchase — Whether time of the essence — Contracts Act 1950 s 47*

***Contract*** *— Specific performance — Inordinate delay — Contra proferentum rule*

***Civil Procedure*** *— Pleadings — Amendment to delete references to defendant's capacity as stakeholder or agent — Effect of amendment — Not a departure from the pleadings*

***Words and Phrases*** *— 'Forthwith'*

In anticipation of a rights issue of shares by Roxy Electrical Industries (M) Bhd ('Roxy'), the plaintiff and defendant entered into two memorandums of understanding, whereby the defendant agreed to buy five million fully paid-up shares ('the said shares') in Roxy for RM5m, on condition that the defendant would resell the said shares at the same price to the plaintiff, if the proposed rights issue by Roxy was aborted. Upon the rights issue being aborted, the defendant wrote to the plaintiff, offering to sell the said shares, and when he received no response within the seven-day period stated therein, the defendant sold the said shares to third parties. One year later, the plaintiff asked for the return of the shares. The defendant failed to do so and the plaintiff applied for an order that the defendant was to deliver the said shares to the plaintiff within seven days of the order, damages for the changes and variations to and breach of the agreement, interest and costs. The plaintiff averred that it was entitled to ask for the return of the said shares on payment of RM5m, and that time was not of the essence.

The plaintiff's application for summary judgment was granted by the senior assistant registrar and the defendant appealed. The appeal against the decision was allowed and the matter was set down for trial. During submissions, the plaintiff applied to amend the statement of claim to delete all references to the defendant acting as agent or stakeholder for an unidentified principal.

**Held**, dismissing the plaintiff's claim:

(1) On the central issue of the construction of the two memorandums of understanding, in view of the exchange of correspondence and sequence of events, the court could only hold that on the balance of probabilities, the defendant's version was more probable. It was

imperative to regard the two memorandums of understanding as interrelated as they involved the same parties, the same subject matter and practically the same terms and conditions. A

(2) As far as the defendant was concerned, this was a straightforward sale of shares with an obligation to repurchase. The defendant had acted as required by the two memorandums of understanding, and as the offer by the defendant had not been taken up by the plaintiff, it should be held to have been revoked after the seven-day period. Although the plaintiff was 'entitled to demand' and the defendant was to 'forthwith return on demand' and 'forthwith to deliver', the parties could not just be expected to sit back and wait. Four months had elapsed since the failure of the rights issue, RM5m was at stake and shares were and are a volatile commodity. If no time for performance was specified, according to s 47 of the Contracts Act 1950, the engagement must be performed within a reasonable time. B C

(3) Specific performance of the memorandum of understanding could not be granted as: (i) the shares were freely available in the open market; (ii) the plaintiff ignored the defendant's letter for one year which amounted to inordinate delay; (iii) damages would be an adequate remedy; (iv) the shares had been sold before the plaintiff's decision to demand; and (v) the contra proferentum rule. D

(4) Since no evidence was led on the part of the pleadings to be amended or deleted, they were therefore of no consequence to the court. Although parties are bound by their pleadings and the court ought to decide only on issues pleaded, the amendments sought concerned the defendant's capacity in the transactions and formed only part of the plaintiff's case. Therefore, they were not construed as a departure from the pleadings and were allowed with no order as to costs. E F

(5) Forthwith means without delay and as soon as practicable or as soon as is reasonably possible.

**[Bahasa Malaysia summary** G

Sebagai menjangka bahawa suatu terbitan hak saham oleh Roxy Electrical Industries (M) Bhd ('Roxy') akan berlaku, plaintif dan defendan telah menandatangani dua memorandum persefahaman, di mana defendan bersetuju membeli lima juta saham terbayar sepenuhnya ('saham itu') di dalam Roxy untuk RM5 juta, atas syarat bahawa jika terbitan hak yang dicadangkan itu terbantut, defendan akan menjualkan semula saham itu pada harga sama kepada plaintif. Apabila terbitan hak itu terbantut, defendan telah menulis kepada plaintif dan menawar untuk menjual saham itu, dan bila beliau tidak menerima jawapan dalam tempoh tujuh hari yang dinyatakan dalam tawaran itu, beliau telah menjualkan saham itu kepada pihak ketiga. Setahun kemudian, plaintiff telah meminta pengembalian saham itu. Defendan gagal berbuat demikian dan plaintif telah memohon untuk perintah bahawa defendan dikehendaki menghantar-serah saham H I

tersebut kepada plaintif dalam masa tujuh hari dari tarikh perintah itu, gantirugi untuk penukaran, variasi dan kemungkiran perjanjian serta kos. Plaintif menegaskan bahawa ia berhak menuntut pengembalian saham tersebut atas bayaran RM5 juta dan masa adalah tidak penting.

Permohonan plaintif untuk penghakiman terus dibenarkan oleh penolong kanan pendaftar dan defendan telah membuat rayuan. Rayuan terhadap keputusan itu telah dibenarkan dan perkara ini ditetapkan untuk perbicaraan. Semasa penghujahan, plaintif telah memohon untuk meminda pernyataan tuntutan untuk memotong segala rujukan kepada defendan yang bertindak sebagai agent atau pemegang amanah harta untuk prinsipal yang identitinya tidak dikenali.

**Diputuskan**, menolak tuntutan plaintif:

(1) Mengenai isu utama, iaitu pentafsiran kedua-dua memorandum persefahaman, memandangkan hubungan persuratan di antara pihak-pihak berkenaan dan urutan kejadian, mahkamah memutuskan bahawa pada imbangan kebarangkalian, versi defendan adalah lebih meyakinkan. Adalah penting untuk melihat kedua-dua memorandum itu sebagai saling berkaitan kerana mereka mengenai pihak yang sama, bahan subjek yang sama dan lebih kurang terma dan syarat yang sama.

(2) Bagi defendan, ini adalah suatu penjualan saham yang terus-terang dengan obligasi untuk membeli semula. Defendan telah bertindak mengikut apa yang dikehendaki oleh kedua-dua memorandum persefahaman itu, dan oleh kerana tawaran defendan tidak diterima, ia patut dianggap sebagai dibatalkan selepas tempoh tujuh hari itu. Walaupun plaintif 'berhak menuntut' dan pihak defendan sepatutnya 'mengembalikan saham dengan serta merta bila dituntut' dan 'menghantar-serahkan saham dengan serta merta', pihak-pihak berkenaan tidak boleh diharapkan untuk menunggu selama-lamanya. Empat bulan telah berlalu selepas 'terbitan hak' dibatalkan, RM5 juta mungkin terjejas dan saham adalah satu komoditi yang tidak tetap nilainya. Jika masa untuk perlaksanaan tidak ditetapkan, maka mengikut s 47 Akta Kontrak 1950, urusan itu mesti dilaksanakan dalam tempoh masa yang munasabah.

(3) Pelaksanaan spesifik memorandum persefahaman tidak boleh diberikan kerana: (i) saham itu boleh didapati dengan mudah dari pasaran saham; (ii) plaintif tidak mengendahkan surat defendan selama satu tahun dan ini adalah kelengahan yang melampau; (iii) gantirugi adalah remedi yang memadai; (iv) saham telah dijual sebelum plaintif menuntut pengembalian saham-saham dari defendan; dan (v) rukun contra proferentum.

(4) Oleh sebab tiada keterangan yang dikemukakan mengenai bahagian pliding yang hendak dipinda itu, pindaan itu tidak mustahak kepada mahkamah. Walaupun pihak-pihak terikat oleh pliding mereka dan mahkamah harus membuat keputusan hanya berdasarkan isu yang terdapat di dalam pliding, pindaan yang

dikehendaki itu berkenaan dengan sifat defendan dalam transaksi tersebut dan hanya membentuk sebahagian daripada kes plaintif. Oleh itu, pindaan itu tidak ditafsirkan sebagai suatu penyimpangan daripada pliding dan dibenarkan tanpa perintah mengenai kos.

(5) 'Forthwith' bermakna tanpa kelengahan dan secepat yang boleh dipraktikkan atau secepat yang semunasabahnya mungkin.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02–374–93.]

**Cases referred to**

1 *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] 3 All ER 492; [1989] QB 842; [1989] 3 WLR 723 (folld)
2 *Amanullah v Nazir Ahmad* [1969] 2 MLJ 1 (refd)
3 *Yat Yuen Hong Co Ltd v Turquand, Youngs & Co* [1970] 2 MLJ 93 (refd)
4 *Karthigasu Arumugam v A Selvadurai & Anor* [1934] MLJ 219 (refd)
5 *Nam Bee Rubber Estate Sdn Bhd v Syarikat Tanaman Perak Bhd* [1986] 1 MLJ 29 (refd)
6 *Yeap Mah Ee v Kuan Kum Chiew & Anor* [1988] 2 MLJ 389 (refd)
7 *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor* [1976] 2 MLJ 177 (folld)
8 *Chin Kim & Anor v Loh Boon Siew* [1970] 1 MLJ 197 (folld)
9 *Gan Realty Sdn Bhd & Ors v Nicholas & Ors* [1969] 2 MLJ 110 (distd)
10 *Mills & Haywood* (1877) 6 Ch 196 (folld)
11 *Yeo Long Seng v Lucky Park (Pte) Ltd* [1971] 1 MLJ 20 (folld)

**Legislation referred to**

Contracts Act 1950 s 47

*Manjit Singh* and *Paramjit Kaur Dhillon* (*Sri Ram & Co*) for the plaintiff.
*Dato' Zaki Tun Azmi* and *LC Neoh* (*Kong Yeam & Chui Sieng*) for the defendant.

**Abdul Malek J**: In their statement of claim filed on 18 June 1990, the plaintiff had pleaded that they were a private limited company operating in Kuala Lumpur, the defendant was an advocate and solicitor practising in Johor Bahru and, that at all material times, the defendant was acting as an agent for unidentified principals and as a stakeholder in the transactions entered into between the parties. They had further went on to plead that in 1988, Roxy Electric Industries (M) Bhd (hereinafter referred to as 'Roxy'), a public company incorporated in Malaysia with its shares listed on the Kuala Lumpur Stock Exchange, had proposed a rights issue of 135,646 shares at RM1 each.

Among other things, they had also pleaded that, on 24 August 1988 and 5 September 1988 respectively, the parties had entered into two

memorandums of understanding, whereby the plaintiff had agreed and had, on each occasion, deposited two and a half million fully paid-up shares in Roxy ('the said shares') with the defendant, as agent of unidentified principals and as a stakeholder, on condition that the defendant pay the plaintiff RM5m, that if the proposed rights issue was cancelled, the plaintiff was entitled to ask for the return of the said shares on payment of RM5m, and that time was not of the essence.

The statement of claim had further stated that by a letter dated 20 March 1990, the plaintiff, through their solicitors, had asked for the return of the shares on payment of the RM5m but the defendant had failed, omitted, neglected and refused to do so. In consequence, the plaintiff had prayed for an order that the defendant be ordered to deliver to the plaintiff the said shares within seven days of the order, damages for the changes and variations to and breach of the agreement, interest, costs and further or other relief.

Having filed a conditional appearance on 4 July 1990, and after filing a summons-in-chambers on 12 July 1990, asking for the writ to be set aside for irregular service, the defendant filed his statement of defence on 2 August 1990, where he had denied that he was acting for another person either as an agent or as an advocate and solicitor and where he had averred that he had, in fact, by letter dated 9 March 1989, asked the plaintiff to buy back the five million shares at RM1 each, which was the prevailing price on the stock exchange but the plaintiff had failed to do so. The defendant had further pleaded that before these proceedings were instituted, the plaintiff had approached the defendant through Roxy's adviser, Vincent Tan, to settle the matter and it had been agreed between them that the five million shares had been sold outright and that each party would have no claims against the other. Vincent Tan had even invited the defendant to be a director of the board of Roxy. In the circumstances, the defendant had stated that he was under no obligation to respond to the plaintiff's letter dated 21 March 1990.

On 1 November 1990, the plaintiff had applied for summary judgment against the defendant. On 2 May 1991, the learned senior assistant registrar had granted the application and had ordered the defendant to deliver the said shares to the plaintiff within seven days of the order and for damages for the changes and variations and for breach of the agreement together with interest and costs. The appeal to the learned judge against this decision was, however, allowed on 25 September 1991. By summons-in-chambers filed on 21 April 1992, the defendant applied to amend his statement of defence by inserting a new para 4(a) and by substituting a new para 10 therefor, and these had been granted by the learned senior assistant registrar on 24 May 1992.

Before me, the plaintiff had only called their signatory to the two memorandums of understanding, namely, Lee Teck Seong, whose testimony mainly reconfirmed the facts which are not disputed by the defendant, as regards the two memorandums of understanding entered into between the parties and the exchange of correspondence exhibited in the agreed bundle. I must add that, despite being their assistant manager then and their manager now, the plaintiff's sole witness was not of much assistance as to a number of questions raised in cross-examination, particularly on the

functions and renumeration of Roxy's adviser, Vincent Tan, what led to the signing of the two memorandums of understanding, who had instructed him to sign on behalf of the plaintiff, whether the purchase money was paid, whether he signed in his room on the first floor or in Vincent Tan's room on the 23rd floor of the same building, what the parties intended and whether there was a board resolution to repurchase the defendant's shares.

On the other hand, the defendant seemed better equipped with the background facts. He had told the court that, before the first memorandum of understanding was signed, there was a big boardroom tussle between Dato Alex Lee and Vincent Tan over Roxy. Roxy had proposed a rights issue of one for one but there were no takers or underwriters. The defendant added that he knew Dato Alex Lee well and, since he had asked the defendant to find someone to underwrite, the defendant had brought in United Industrial Corporation ('UIC'), whose chief executive, Oei Hong Leong, was a close friend of the defendant and who had agreed to look into the matter of full underwriting. During the negotiations, Vincent Tan had offered the defendant five million shares in Roxy priced at RM1 to RM1.05 then. The understanding was that if the underwriting did not work out, the defendant would return the shares and the plaintiff would repay the money.

The defendant maintained that Roxy was in a serious financial crisis and, in November 1988, after going through the accounts, UIC had decided not to proceed with the underwriting. The defendant had approached Vincent Tan to take back the shares but he did not respond. Some four months later, the defendant, through his solicitors, had accordingly written the letter dated 9 March 1989 to the plaintiff, copied to Vincent Tan. It is pertinent to reproduce the letter at this stage:

> Kong Yeam & Chui Sieng
>
> Our ref: KYCS/4350/8812/NKY/JK
> Your ref:
> 9 March 1989
>
> M/s HA Securities Sdn Bhd AR Registered
> 1st Floor, Wisma On-Tai
> 161B, Jalan Ampang
> 50450 Kuala Lumpur
>
> Dear Sirs
>
> Re: Purchase of five million ordinary shares of RM1 each in Roxy Electric Industries (M) Bhd ('Roxy')
>
> We act for Mr Ng Kong Yeam of 5th Floor, Wisma Ng, No 1, Jalan Meldrum, 80000 Johor Bahru.
>
> We refer to the sale of five million Roxy shares to Mr Ng Kong Yeam by you and the agreement by which you will repurchase the five million shares from him at RM5m if the rights issue be aborted for whatever reason or the rights issue, if completed, is not in accordance with the terms and conditions reached between the UIC/Alex Lee/shareholders who assigned the rights entitlements to Innomission Sdn Bhd or any breach in the terms and conditions specified in the underwriting agreements, whereby any deviation from the underwriting

agreements would require the mutual consent, including HA Securities Sdn Bhd.

In view of the fact that the rights issue had not been proceeded with, we shall be pleased if you will let us have RM5m and we will deliver the five million Roxy shares to you.

Please note that if we do not hear from you within seven days from the date hereof, our client will dispose of all the shares and recover from you the shortfall.

Yours faithfully,
—Sgd—
Tetuan Kong Yeam & Chui Sieng

cc Mr Vincent SY Tan

Following that letter and, unknown to the plaintiff, the defendant had sold off the said shares. Subsequently, Vincent Tan had asked the defendant to sell Development & Commercial shares belonging to Roxy, to UIC, which the defendant did. Vincent Tan had also told the defendant to sell a substantial amount of Roxy shares to Oei Hong Leong in his personal capacity, which the defendant again did. The defendant was then invited to be a member of the Roxy board and Oei Hong Leong was made chairman. Vincent Tan remained as adviser. The defendant reiterated that, at all material times, he had acted in his personal capacity and not as a stakeholder or agent and he had only dealt with Vincent Tan. Because of all this, the defendant was quite stunned when he was asked to return the shares about a year later when the plaintiff's solicitors sent the letter dated 21 March 1990. For impact and effect, the said letter is reproduced here:

Sri Ram & Co

21 March 1990

Your Ref:
Our Ref: CVK/hm/2/6630/90 AR Registered

1) Mr Ng Kong Yeam
5th Floor, Wisma Ng
No 1, Jalan Meldrum
80000 Johor Bahru

and/or

2) Mr Ng Kong Yeam
23rd Floor, Wisma On-Tai
c/o Roxy Electric Industries (M) Sdn Bhd
161B, Jalan Ampang
50450 Kuala Lumpur

Dear Sir,

Re: Agreements dated 24 August 1988 and 5 September 1988 for the sale of five million ordinary shares of RM1 each in Roxy Electric Industries (M) Bhd ('Roxy')

We act for Messrs HA Securities Sdn Bhd of 1st Floor, Wisma On-Tai, 161B, Jalan Ampang, 50450 Kuala Lumpur.

We refer to the agreements pursuant to which our client placed with you five million Roxy Electric Industries (M) Sdn Bhd ('Roxy') shares.
The consideration in respect of which the agreements were entered into has failed in view of the fact that the proposed rights issue by Roxy was abortive.

Our client has requested us to put you on notice, which we hereby do, that you are to deliver to our client five million Roxy shares against payment by our client of a sum of RM5m.

Our client is ready, willing and able to accept delivery of the shares and make payment to you at any time within seven days of the date of this letter.

The aforesaid transaction may be undertaken at our client's premises or at such place and time that you may nominate within seven days of the date of this letter.

Yours faithfully,
—Sgd—
C Vijaya Kumar

It is of particular interest to note that the addresses of the defendant at the beginning of that letter, namely, to him care of his address stated in his solicitors' letter dated 9 March 1989 and to him care of Roxy's address, tie in with the defendant's evidence as to the events before and after the relevant memorandums of understanding. As far as the defendant was concerned, this was a straightforward sale of shares with an obligation to repurchase. He also said that the two memorandums of understanding were prepared by the plaintiff and he did not actually want the shares which he had bought after taking a personal loan with interest and which he had sold off at a loss.

Under cross-examination, the defendant agreed that he was yet to file a counterclaim as he was reserving his right in that respect. He had also made no demands on the plaintiff, as the amount had not been quantified. He also agreed that he had acted gullibly in the matter, despite having been in legal practice for about 20 years at that point of time.

To my mind, the whole dispute rests on the construction of the two memorandums of understanding. It is therefore certainly proper to reproduce them here:

Memorandum of understanding between:

1) HA Securities Sdn Bhd
2) Ng Kong Yeam (IC No 3710589)

Re: Sale of 2,500,000 Roxy Electric Industries (M) Bhd shares ('REIMB shares') of RM1 each

Whereas:

REIMB has proposed a rights issue of 135,646,000 new ordinary shares of RM1 each at the issue price of RM1.

Commerce International Merchant Bankers ('CIMB') has agreed to underwrite the entire rights issue ('the underwritten shares') upon the terms set out in the draft underwritten agreement to be entered into between REIMB and CIMB, a copy of which is attached herewith.

UIC Group has in turn sub-underwritten the underwritten shares with CIMB upon the terms that certain entitlements of the rights issue which shall not

A be less than 25% of the entire issue and the enlarged capital would be assigned to Innomission Sdn Bhd, the wholly-owned subsidiary of UIC.

Notwithstanding any terms or conditions that may be contained in the sub-underwritten or underwritten agreement referred to above, it has been agreed between UIC and HA Securities Sdn Bhd that:

B In consideration of the understanding reached between the parties herein mentioned, HA Securities Sdn Bhd hereby confirms the sale of 2,500,000 REIMB shares to Mr Ng Kong Yeam (IC No 3710589) for a consideration of RM1 per share for a total consideration of RM2.5m upon the terms that Mr Ng Kong Yeam (IC No 3710589) would *undertake to forthwith resell* the above-mentioned shares to HA Securities Sdn Bhd at the same consideration should:

C a) The rights issue be aborted for whatever reason:
b) The rights issue if completed, not be in accordance with the terms and conditions reached between the UIC/Alex Lee/shareholders who assigned the rights entitlements to Innomission Sdn Bhd or [if there is] any breach of the terms and conditions specified in the underwriting agreements whereby any deviation from the underwriting agreement would require the mutual
D consent including HA Securities Sdn Bhd. (Emphasis added.)

HA Securities Sdn Bhd
1st Floor, Wisma On-Tai
161B, Jalan Ampang
50450 Kuala Lumpur

E —Sgd— —Sgd—
HA Securities Sdn Bhd Mr Ng Kong Yeam
Lee Teck Seong (IC No 3710589)

Witnessed by:
—Sgd—
Vincent SY Tan

F Dated 24 August 1988

and

Memorandum of understanding between:

G 1) HA Securities Sdn Bhd
2) Ng Kong Yeam (IC No 3710589)

Re: Sale of 2,500,000 Roxy Electric Industries (M) Berhad shares ('REIMB shares') of RM1 each

Whereas:

H (i) HA Securities Sdn Bhd is to sell and Mr Ng Kong Yeam is to purchase a total of 2,500,000 shares of Roxy Electric Industries (M) Bhd ('REIMB') at RM1 per share for a total consideration of RM2.5m which said transaction is conditional upon the terms and conditions stated herein.
(ii) REIMB has proposed a rights issue of 135,646,000 new ordinary shares at par value of RM1 each at the issue price of RM1 per share.
I (iii) By various agreements made sometime in May 1988 between the United Industrial Corporation Limited ('UIC') of the one part and Dato Alex Lee of the second part and several others (hereinafter called 'the shareholders'). Dato Alex Lee and the shareholders have assigned their rights entitlements

in respect of the aforementioned proposed rights issue to Innomission Sdn Bhd, a wholly-owned subsidiary of the UIC Group, upon the terms and conditions therein stated.

(iv) Commerce International Merchant Bankers Bhd (CIMB) has agreed to underwrite the entire proposed rights issue and the UIC Group has in turn agreed to sub-underwrite CIMB upon terms and conditions as stated in the relevant agreements (hereinafter referred to as 'the underwriting agreements').

Now it is hereby agreed as follows:

1 In consideration of HA Securities Sdn Bhd selling to Mr Ng Kong Yeam a total of 2,500,000 shares of REIMB at RM1 per share for a total consideration of RM2.5m, Mr Ng Kong Yeam hereby agrees, undertakes and warrants to *forthwith return on demand* the said shares to HA Securities Sdn Bhd at the price of RM1 per share for the total consideration of RM2.5m upon the occurrence of any one of the following events:

(a) the proposed rights issue by REIMB referred to in recital (ii) herein is aborted or not completed for any reason whatsoever; and/or

(b) the said rights issue of REIMB shares if completed is not in accordance with the terms and conditions as stated in the agreement referred to in recital (iii) hereof, and/or

(c) there is a breach, non-compliance or any deviation from the terms and conditions as specified in the underwriting agreements, referred to in recital (iv) herein.

2 Upon the occurrence of any one of the aforementioned events, HA Securites Sdn Bhd *shall be entitled to demand* for the immediate return of the said 2,500,000 REIMB shares against the payment of the sum of RM2.5m free of interest and Mr Ng Kong Yeam *shall forthwith deliver* the said shares to HA Securities Sdn Bhd against the payment of RM2.5m free of interest. (Emphasis added.)

Dated 5 September 1988

HA Securities Sdn Bhd
1st Floor, Wisma On-Tai
161B Jalan Ampang
50450 Kuala Lumpur
—Sgd—
HA Securities Sdn Bhd

—Sgd—
Mr Ng Kong Yeam
(I/C No 3710589)

Witnessed by:
—Sgd—
Vincent SY Tan

As regards the first memorandum of understanding dated 24 August 1988, my mind had been directed to the words 'undertake to forthwith resell' appearing two lines before sub-para (a) as emphasized. As for the second memorandum of understanding dated the 5 September 1988, the relevant words in my opinion are 'forthwith return on demand' at para 1 and 'shall be entitled to demand' and 'shall forthwith deliver' at para 2 as has been emphasized.

Going back to the earlier memorandum of understanding, the emphasized portion, namely, 'undertake to forthwith resell' was what the defendant had

actually done, when the rights issue was aborted, by his solicitors' letter dated the 9 March 1989. The joint effect of the excerpts underlined in the later memorandum of understanding was that, upon the rights issue not going through, the plaintiff was entitled to demand and when they did so, the defendant should 'forthwith return on demand' or 'shall forthwith deliver' the said shares. This is where the problem has crept in, because the plaintiff did not take any action until one year and four months had elapsed since the failure of the proposed rights issue.

I could not agree with learned counsel for the plaintiff when he said in his submissions that the events leading to the two memorandums of understanding were totally irrelevant. I would venture further to say that, on the contrary, they were indeed wholly relevant to construe the effect of the two transactions in the right perspective. In this respect, it is quite obvious that the evidence of the plaintiff has been quite lacking.

The court had also taken into account that this was a big deal involving five million shares and RM5m; that the defendant had admitted that he was a bit gullible despite being an advocate and solicitor of 20 years' standing, but it must also be remembered that he was acting in his personal capacity and not as an advocate and solicitor, agent or a stakeholder; that at that time it was beneficial for the defendant to get the shares below the market value now and that, if the rights issue had gone through, the defendant would have got another five million shares just like that; that although the defendant had said he had sold the shares at a loss, he had not counterclaimed nor made a demand nor has he filed a suit to recover the said loss; and that it was certainly not beneficial for the defendant to return the said shares now as the value had shot up to RM4.80 each.

In the same breath, however, it must be considered that had the defendant known of the fact that the shares were going to go up five times as much, as they were fluctuating at the same low level for a long time then, he surely would not have disposed of the shares at that stage. He had explained that he had sold them then as the rights issue had not gone through and that there had been no response to his letter dated 9 March 1989. At the same time, the plaintiff was holding on to the RM5m and could certainly make money out of it over the relevant period.

To my mind, it is imperative to regard the two memorandums of understanding as interrelated as they involved the same parties, the same subject matter and practically the same terms and conditions, albeit transacted on different dates exactly two weeks apart. The defendant had clarified the purpose leading to the two memorandums of understanding which, I must add, have been corroborated by the contents of the said memorandums of understanding and the exchange of correspondence and once the event stated, namely, the rights issue not going through, had taken place the parties could not, in my opinion, have been expected just to sit back and wait, although the plaintiff was 'entitled to demand' and the defendant was to 'forthwith return on demand' and 'forthwith deliver' as stated in the second memorandum of understanding.

Section 47 of the Contracts Act 1950 specifically provides that 'where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement

must be performed within a reasonable time'. (Especially so when shares are a volatile commodity, a party cannot be made to wait forever). In *British and Commonwealth Holdings Plc v Quadrex Holdings Inc*,[1] the Court of Appeal had observed that 'since the moneybroking businesses which were the subject of the agreement [were] traded in a volatile sector it was unlikely that the parties intended that the sale should be held up indefinitely while the defendant obtained the necessary finance' and that 'however, in the case of a hazardous or wasting asset where in a real commercial sense time was of the essence, so that if a time for completion had been specified in the contract time would have been of the essence, one party could make time of the essence by serving a reasonable notice to complete and, moreover, could do so even though the other party had not been guilty of improper or undue delay'.

It must be noted that at all the three places emphasized in the two memorandums of understanding as regards the obligation of the defendant on the happening of the specific event of the rights issue being aborted, namely, 'undertake to forthwith resell' in the first and 'forthwith return on demand' and 'shall forthwith deliver' in the second, the word 'forthwith' appears to be the key word although the second excerpt indicates an immediate return only on demand by the plaintiff. On the other hand, as for the obligation of the plaintiff on the happening of that specific event, they only 'shall be entitled to demand' according to the second memorandum of understanding, which to my mind is not so strong a burden placed on the plaintiff, to the extent that they might not even have to exercise this option if they do not wish to. As to the dictionary meaning of 'forthwith' legally, a number of cases, namely, *Amanullah v Nazir Ahmad*,[2] *Yat Yuen Hong Co Ltd v Turquand, Youngs & Co*,[3] *Karthigasu Arumugam v A Selvadurai & Anor*,[4] *Nam Bee Rubber Estate Sdn Bhd v Syarikat Tanaman Perak Bhd*,[5] and *Yeap Mah Ee v Kuan Kum Chiew & Anor*[6] have held that it means without delay and as soon as practicable or as soon as is reasonably possible.

Being 'entitled to demand' may have been the reason why the plaintiff did not take any steps when the rights issue was aborted. It could have been an oversight on their part but, in the circumstances of this case, that cannot be so, as the defendant had written to them four months after the specific event to remind them. Yet they chose to do nothing and only decided to demand the return of the shares one year after that letter.

The defendant's letter, dated 9 March 1989, gave the plaintiff seven days to reply and it is manifestly clear that this offer by the defendant had not been taken up by the plaintiff and should be held to have been revoked after the seven-day period. In *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor*,[7] the Ipoh High Court had ruled that the court could take into account the conduct of the parties after the offer was made, in deciding whether the offeree had allowed too long a time to lapse before accepting and that the option had been revoked well before the purported intention to exercise the option. In *Chin Kim & Anor v Loh Boon Siew*,[8] the Federal Court had held that in that case, on repudiation of the contract by the vendors, the purchaser should have made his position clear as to whether he accepted the repudiation or refused to accept it; in view of the delay of the

purchaser, the proper inference was that he had accepted the rescission. They further held that in those circumstances, he was not entitled to specific performance. There, the purchaser took four years to take action. The facts here are not exactly the same, but the principle is in that the plaintiff took one year to make the demand after being reminded by the defendant.

The defendant, therefore, had acted strictly as required in the first memorandum of understanding. In the same way, he had also acted within the framework of the second memorandum of understanding as, although no demand had been made by the plaintiff, who was only entitled to demand, four months had elapsed since the failure of the proposed rights issue and RM5m was at stake, and shares were and are a volatile commodity. It was certainly not wrong for him to remind the plaintiff at that juncture. Now, why did the plaintiff not respond to that letter at all? No valid explanation had been forthcoming and the only conclusion is that they were either waiting for the price to go up or they had then decided not to exercise their option to demand the return of the shares.

In these circumstances, the plaintiff surely cannot now ask for specific performance of the two memorandums of understanding because:

(a) the shares were freely available in the open market, unlike the decision in *Gan Realty Sdn Bhd & Ors v Nicholas & Ors*;[9]

(b) the plaintiff had ignored the defendant's letter for one year which amounted to inordinate delay considering the earlier four month lapse since the rights issue was aborted, the case of *Mills & Haywood*[10] being a case on point;

(c) damages would be an adequate remedy, as decided in *Yeo Long Seng v Lucky Park (Pte) Ltd*;[11]

(d) of the fact that the shares had actually been sold before the plaintiff's delayed decision to demand; and

(e) in view of the contra proferentum rule.

On the central issue of the construction of the two memorandums of understanding, viewed in the light of the exchange of correspondence, and the sequence of events including the events leading up to the two memorandums of understanding, the court could only hold that the version of the defendant was the more probable of the two versions upon a balance of probabilities. The non-availability of Vincent Tan, who both parties agree had absconded to Australia, certainly did not alter the situation as the documents amply illustrate his involvement in the matter.

I had accordingly dismissed the plaintiff's claim with costs.

As for the amendments to the statement of claim to delete all references to the defendant acting as a stakeholder or agent, asked for by learned counsel for the plaintiff at the submission stage after learned counsel for the defendant had submitted and who quite understandably had objected to them, the court was of the view, since no evidence was led on that part of the pleadings to be amended or deleted and they are therefore of no consequence to the court, and also because the defendant had testified that he was, all along, acting in his personal capacity, that it should, as a matter

or record, allow the amendments asked for with no order as to costs. It must be pointed out that I was more than aware that parties are bound by their pleadings and that the court ought to decide only on issues pleaded, but as the amendments sought concerned only the defendant's capacity in the transactions and formed only part of the plaintiff's case, I did not construe the situation as a departure from their pleadings since the crux of this matter was the interpretation of the two memorandums of understanding entered into between the parties.

*Order accordingly.*

Reported by Elizabeth Verghis